Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

JOSE LUIS MEZA-LOPEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. After the police conduct an illegal search can they justify their illegality by claiming that a defendant abandons his Fourth Amendment interests if when confronted with the fruit of the illegal search he denies any connection to it?

2. Does the "inevitable discovery doctrine" justify an otherwise unlawful search when after the search is completed a defendant denies any connection to the place that was searched or the items that were seized?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jose Luis Meza-Lopez, respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-titled proceeding on August 13, 2001.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported at 260 F.3d 863 (2001). It is reprinted in the Appendix hereto, p. 1, *infra*.

The Judgment Order of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the Appendix hereto, p. 10, *infra*.

The Memorandum and Order of the United States District Court for the District of Nebraska has not been reported. It is reprinted in the Appendix hereto, p. 11, *infra*.

The Report and Recommendation of the United States District Court for the District of Nebraska has not been reported. It is reprinted in the Appendix hereto, p. 15, *infra*.

The Order of the Court of Appeals for the Eighth Circuit denying the Petitioner's Petition for Rehearing and for Rehearing En Banc has been reprinted in the appendix hereto, p. 62, *infra*.

JURISIDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 13, 2001, affirming the Order of the District Court dated May 2, 2000. The Eighth Circuit Court of Appeals denied a timely Petition for Rehearing on September 27, 2001.

On December 27, 2001, Justice Thomas ordered that the time for filing this Petition for Writ of Certiorari be extended to and including February 24, 2002.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger.

STATEMENT OF THE CASE

On June 2, 1999 the Omaha Police conducted a warrantless search of the hotel room of Jose Luis Meza-Lopez. This search was conducted without the knowledge or consent of Meza-Lopez who was in the hotel restaurant at the time. During this search the police searched his room, opened and inspected all his luggage and searched behind a panel underneath the sink in the defendant's bathroom. After finding a screwdriver in the room the police unscrewed a wooden panel underneath the sink where they found a bag of cocaine.

During the execution of the warrantless search of the defendant's hotel room, two other policemen were watching the Petitioner and his friend who were dining in the hotel restaurant. The Petitioner was totally unaware that the police were searching his room, since the police had not sought his consent to search it. They simply kept him under surveillance while others were going through his room.

Following the discovery of the cocaine the police then replaced and resealed it under the sink by replacing the wooden panel. They then left the hotel room after attempting to make it appear that the room had never been searched.

Only after their intrusion and cover-up did the police confront the defendant and his companion in the restaurant. They then marched both individuals to the hotel

room and asked them if this room was theirs. They then for the first time asked for his permission to search his room. Both the Petitioner and his companion denied any connection to the room. Thereafter the police took them inside the room and confronted them with the cocaine. Both defendants denied any knowledge or connection to the cocaine and both were then arrested.

Background

The defendant's hotel room, Room 222, had been rented for them by a lady named Mary Stewart. Mary Stewart had been hired by the defendant to drive a car from El Paso, Texas to Omaha, Nebraska. When Stewart arrived in Omaha, pursuant to her instructions, she rented a room for herself, Room 123; and she also rented Room 222 for the defendants. Within an hour she met with the defendants and gave them the key to their room.

At no time did she ever enter or occupy Room 222. Her only connection to it was to rent it for the defendants and then to relinquish the key by giving it to them.

The investigation of the defendants was initiated as the result of an intercepted telephone call on June 2, 1999 between a Hispanic male in Room 222 and another individual in Omaha whose phone was subject to a wiretap order. After intercepting this call between the defendant and the other party the police surmised that a drug transaction might transpire at the hotel.

Following the call the police set up a surveillance of Room 222 by placing officers in the hallway and the lobby in order to watch for the defendants. The police

then placed a telephone call to Room 222 which was answered by a Hispanic male, later identified as the Petitioner. The police, after determining the room was occupied, hung up on the Petitioner.

As part of their surveillance the police from the parking lot observed the Petitioner and another Hispanic male through the window inside Room 222. From this observation the police were able to obtain a description of both individuals.

At approximately 8:45 p.m. an officer observed the defendants leaving the hotel through the lobby. At approximately 9:00 p.m. the police walked a drug dog through the hallway past both rooms 123 and 222 with no results.

At approximately 9:20 p.m. the officers observed the defendants return to the hotel parking lot where they reentered the hotel and went into the restaurant there. Two officers were posted to maintain surveillance of both of the defendants.

Events Leading Up To The Search

Other than one Hispanic family, the officers learned from hotel management that the two defendants were the only Hispanic males staying in the hotel. The officers were also aware that these two Hispanic males were the same two who had been earlier observed inside Room 222. It was only after the officers knew that the two defendants were in the restaurant that they devised the circuitous chain of events that lead to the warrantless search of the room.

The officers had quickly learned from hotel management that Mary Stewart in Room 123 had also rented Room 222 using her credit card. With the defendant still in the restaurant the officers went to his room and knocked on his door. As expected there was no answer since the defendant was in the restaurant under police observation.

The officers next went to Room 123 and knocked on Mary Stewart's door. The officer once inside became suspicious of Mary Stewart and searched her room pursuant to her consent. They then asked her, and not the defendant, to give them permission to search Room 222.

Stewart told the officers that she did not have the authority to give consent to the search of Room 222. She told them on several occasions that they should wait and ask the Petitioner and his companion for consent to search their room. Although Stewart was unwilling to give a consent to search the defendants' room, she eventually relented after the officers told her she had the authority to do so.

After she had granted this consent the officers contacted the hotel manager at 9:30 p.m. and had him admit them into Room 222. The officers did this knowing that Stewart's only connection to Room 222 was that she had rented it but now no longer had the key.

After their arrest the defendants contested the validity of Mary Stewart's authority to give the police consent to search their room but the issue of the validity of her consent was never addressed by the Eighth Circuit.

Despite the fact that Stewart had given them consent to search only the room, the police searched the defendants' closed luggage as well as a compartment under the sink. Three pieces of luggage belonging to the defendants were unzipped and thoroughly searched. The panel beneath the sink was removed with a screwdriver found within the room and cocaine was discovered concealed there.

After they found the cocaine under the sink the police replaced the panel and re-closed the defendants' bags in an effort to make it appear that the room and its contents had never been disturbed.

Only after the cocaine was found and the room restored were the defendants contacted. Two officers sat down at the table with them and asked them for their identification. The officers patted them down and made them remove the contents of their pockets. At this time the officers observed the Petitioner remove the car keys from his pocket that belonged to the rental car which Mary Stewart had driven to Omaha.

Upon questioning, the defendants told the police that they were there to meet a friend named Maria who was staying at the hotel. The police asked them to take them to Maria's room. On the way to Room 123 the officers redirected the defendant to Room 222 instead. They were placed in front of Room 222 in the presence of several officers and asked about the room. In response the Petitioner denied that it was his room. Thereafter the police re-entered the room and ordered the defendants inside. There, the defendant denied ownership of the luggage

and of the cocaine which the police "rediscovered" under the sink.

Based upon this disclaimer of ownership the police made the argument that the defendant had abandoned any expectation of privacy he had in his room. This disclaimer, they claimed, resuscitated an otherwise unlawful search and somehow transformed it into a lawful one. Incredulously the Eighth Circuit accepted this argument. In the Eighth Circuit the Fourth Amendment has now been turned on its head.

On August 27, 1999, the Petitioner filed a Motion to Suppress the fruits of the search of Room 222. On February 8, 2000, the United States Magistrate Judge found that Mary Stewart had given a valid consent to search Room 222; that the defendants had no reasonable expectation of privacy in the area underneath the bathroom sink of their hotel room; and that the defendants had abandoned their privacy interests in Room 222 when confronted by the officers. App. A15-A61. The District Court for the District of Nebraska accepted these findings and denied the Petitioner's Motion to Suppress in an Order dated May 2, 2000. App. A11-A14.

The Eighth Circuit upheld the District Court's Order in a Judgment filed on October 9, 2001. App. A10. In their opinion (App. A1-A9) the Eighth Circuit upheld the findings of the District Court by examining the issue of abandonment only, without addressing the issues of Stewart's third-party consent or the defendants' reasonable expectation of privacy in the area underneath the sink. The Eighth Circuit held that the Petitioner had

voluntarily abandoned any reasonable expectation of privacy with respect to the contents of his room. The opinion further justified the officers' conduct under the "inevitable discovery doctrine." They held that had the officers not previously searched the room and found the cocaine, the officers most probably would have approached the defendants and the same disclaimers would have resulted. App. A7-A8.

The Petitioner requested a rehearing en banc, which was denied on September 27, 2001. App. A62.

REASONS FOR GRANTING THE WRIT

I. **To permit the police to justify an otherwise illegal search by claiming that a defendant abandons his Fourth Amendment protections when after the fact he denies any connection to the place that was searched or the items that were seized will allow the police to do an end run around the Fourth Amendment. Such a practice will allow the police to ignore the necessity for obtaining a search warrant and will encourage them to commit illegal searches knowing that most defendants when confronted with illegally seized contraband will disclaim any connection to it.**

The impact of the decision by the Eighth Circuit to allow police to conduct an illegal search without a warrant and then to later justify that illegal search upon a theory that the defendants somehow abandoned their expectations of privacy will allow the police as a matter of course to do an end run around the Constitution. The Eighth Circuit has now held that despite the taint an

after-the-fact abandonment theory can somehow justify an otherwise illegal search.

While an act of abandonment may arise out of a disclaimer made in response to police questioning, the courts have always held that the abandonment must precede the search. *U.S. v. Colbert*, 474 F.2d 175 (5th Cir. 1973). To hold otherwise, as the Eighth Circuit has now done, threatens every defendant's constitutional protection against unreasonable searches and seizures as well as his Fifth Amendment protections against self-incrimination.

When the police are permitted to conduct illegal searches and then later confront a defendant with seized contraband, if the defendant then admits the connection to the illegally seized evidence he will be arrested. If, on the other hand, the defendant denies any connection to the contraband when questioned he will then invariably face the erroneous argument that he has abandoned his Fourth Amendment rights against unreasonable searches and seizures.

The Eight Circuit's decision, in effect, eliminates the necessity for police to obtain a search warrant because it provides the police with an opportunity to use a defendant's denials as an after-the-fact justification for illegal searches they conduct.

The logic of this holding is not only erroneous but exceptionally dangerous.

If allowed to stand this precedent will open Pandora's Box by allowing the police, in most instances, to dispense with the necessity of ever attempting to get a search warrant. The police can now execute warrantless

searches without probable cause on a person's homes, apartments, motel rooms, storage sheds, vehicles or other properties. Then if they seize contraband they only need to confront a potential defendant with it. If a potential defendant denies knowledge or ownership of the contraband, as most often will be the case, this will erase the taint and an otherwise unlawful search will then magically become lawful.

If this circumspect practice is approved by this Court the police will only in rare instances have the incentive to obtain a search warrant. They will simply invade a person's motel room or other locations where a person has a reasonable expectation of privacy and count on human nature to take its course.

Thereafter, when the defendant denies ownership of any contraband the police would now have a lawful search and could then prove up their case against the defendant by other evidence of his connection to those premises, despite his disclaimer of having no connection to it. This would be true even though any disclaimer would be tainted by the prior illegal search made by the officers. However, the law up until now has always been that when an illegal search taints a later act of abandonment, the evidence acquired after the abandonment should be suppressed as the fruit of an unlawful search. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

This Court has never directly addressed whether a genuine abandonment following an illegal search may arise out of a disclaimer of ownership made in response

to a post-search police interrogation. It certainly has never held that police officers can resuscitate an otherwise unlawful search just by obtaining a disclaimer of ownership from the victim of their illegality.

The Eighth Circuit opinion rested solely on the Petitioner's alleged abandonment of the contents of his hotel room. As the record reveals, however, this abandonment by the Petitioner was involuntary and was made while in the custody of the investigating officers who knew his disclaimer to be false. The police had already connected the Petitioner to the room which they had searched without his knowledge or consent.

At the time the officers confronted him in the restaurant, they had already finished the search of his room and knew of the presence of the contraband therein. The defendants were directed to Room 222 by the officers, who knew they were linked to the hidden cocaine found within the room. The officers also knew that the two men would most likely deny any connection to the room or its contents, which might allow them to raise an abandonment theory.

If, on the other hand, the two men admitted the room was theirs, the officers would have been required to ask for a consent to search the room or make an application for a search warrant. Nonetheless, when the Petitioner denied any interest in Room 222 or its contents, the officers involved knew that the Petitioner was not telling the truth.

The Petitioner was given a Hobson's choice either to make an incriminating admission by acknowledging his connection to Room 222 and its contents, or to make a

false disclaimer of any interest in the room. In *U.S. v. Colbert*, 474 F.2d 174 (5th Cir. 1973), the Fifth Circuit upheld an abandonment of two suitcases which the defendants claimed to know nothing about, even though the officers saw the same defendants carrying the suitcases in question only seconds before. In Judge Goldberg's dissent in *Colbert*, he addressed the validity of knowingly false abandonment statements: "A coerced lie cannot effect an abandonment. No one, but no one, could have believed that defendants were not in possession of the briefcases. To say that defendants knew they were waiving a constitutional right when they uttered these meaningless lies under the threat of imminent discovery is a fiction, pure and simple." *Id.*

The effect of the Petitioner's alleged abandonment in this case is similar to that of the defendant in *Colbert*, as no one involved could possibly have believed that the Petitioner was voluntarily abandoning his interest by denying his connection to his room.

Any experienced law enforcement officer knows that the majority of criminal suspects when confronted will deny any link to anything that is incriminating. In *Walter v. U.S.*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), a shipment of obscene films was misdelivered and eventually ended up in the hands of the FBI. In Justice Stevens' opinion, the fact that the defendant did not immediately make a claim with the government to return the films was not equated with an abandonment of his privacy interest as he stated: "We cannot equate an unwillingness to invite a criminal prosecution with a voluntary abandonment of any interest. . . . " *Id.* This

same principle should be applied here, as an abandonment should not be considered voluntary if the defendant's truthful answer would have undoubtedly resulted in his immediate arrest.

Various courts have invalidated abandonments on the basis that they took place either while the defendant was in the process of being arrested or while he was already in custody. In *U.S. v. Gwinn*, 191 F.3d 874 (8th Cir. 1999), a defendant's alleged abandonment of his bag was overturned because the defendant "denied that he owned the black bag only after he had been seized and handcuffed by the officers." Considering the abandonment in this context, the Eighth Circuit held that the defendant's actions "can hardly be characterized as a voluntary act."

In *State v. Morton*, 326 Or. 466, 953 P.2d 374 (1998), the court reached an opposite result from *Colbert* when a criminal defendant was placed in a similar situation. Just as in *Colbert*, the officers in *Morton* saw the defendant carrying the same item allegedly abandoned only seconds later. Whereas in *Colbert* the abandonment was upheld despite the fact the defendants were obviously lying about their interest in the briefcases, in *Morton* the abandonment was held to be involuntary on the basis that the container was dropped during an arrest and because the officers knew that his claim to know nothing of the container was obviously false.

An abandonment cannot be upheld when the disclaimer is known to be obviously false and it is made in response to police questioning while in their custody. Otherwise, law enforcement officers will be able to conduct illegal searches and maneuver defendants into no-

win situations where they face either making an incriminating admission or making disclaimers which the officers know to be false.

In the instant case the Petitioner's room was subjected to an illegal search which resulted in the discovery of cocaine. The police then left the Petitioner's room after putting it back together to disguise the fact that they had even been there. Had they attempted to get a warrant based on the probable cause from the illegal entry that warrant would be totally tainted by the illegality of their actions.

Yet here, when no subsequent warrant was ever applied for, the police have now been allowed to justify their actions because they confronted the defendant with the tainted fruit of their illegal conduct and because the defendant denied any connection to it.

If a subsequent warrant would be totally tainted by the earlier illegal conduct of the police, any subsequent act of abandonment based on a defendant's disclaimer should also be just as tainted.

This Court should overrule the Eighth Circuit's opinion and hold that any act of abandonment by a defendant must precede rather than follow any search. It should hold that when an illegal search taints a later act of abandonment that the evidence acquired after the alleged abandonment should be inadmissible as the fruit of an unlawful search.

II. To expand the "inevitable discovery doctrine" to justify an illegal search because a defendant when confronted with the fruit of that search denies any connection to it would mean that every unlawful search no matter how illegal could be excused just because a defendant chooses not to incriminate himself.

The inevitable discovery exception to the exclusionary rule, as recognized by this Court in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), allows for the admissibility of evidence found following a Fourth Amendment violation if the evidence would have inevitably been discovered lawfully. Under the inevitable discovery doctrine, evidence will be excluded if the defendant shows that the officers would not have been able to obtain the evidence without the constitutional violation.

This Court has reiterated on numerous occasions that a major purpose of the exclusionary rule is the deterrence of unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In *Terry*, this Court stated: "A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Id.*

In the Eighth Circuit's opinion the court had to impermissibly expand the "inevitable discovery doctrine" in order to justify the conduct of the officers. App. A7-A8. Its opinion did not directly address the illegality of the search of the Petitioner's hotel room, but instead justified the search based upon the Petitioner's alleged abandonment of his privacy interests. The Eighth Circuit reached

this decision by hypothesizing about what might have happened had the officers waited to ask the Petitioner for consent to search Room 222, rather than first conducting their illegal search.

The Eighth Circuit stated "that hypothetical conversation in the restaurant would have been substantially similar to what actually occurred . . . it is a virtual certainty that the defendants would have responded by abandoning their property interest in Room 222 and its contents, because their actual decision to abandon was made without knowledge that the officers had searched Room 222 or found hidden cocaine." App. A8. The officers' illegal search was justified by the Eighth Circuit's prediction of what the outcome might have been had the officers followed Fourth Amendment procedure as opposed to relying on a potential abandonment to search the Petitioner's room.

The Eighth Circuit's rhetoric is only a guesstimate of what the defendant may or may not have done if asked for permission to search under other circumstances. It was in no way a logical nor persuasive argument for inevitable discovery. Had the police not searched but asked the Petitioner for a consent to search there is no guarantee as to what might have happened. First the defendants could have refused to give the police consent to search their room. They could have elected to assert their rights against a warrantless search and denied them access. Under these circumstances, if no illegal search had been conducted earlier the defendants by asserting their connection to the room and their rights not to consent would not have incriminated themselves by so doing.

Second, the defendants could have said nothing. They could have exercised their right to remain silent and made no comment at all. Had they done so the police could have done nothing to them and conducted no search.

Third, the defendants could have asserted their rights and told the police that they could search their room but only if they obtained a search warrant.

Fourth, they could have given the police the limited consent to search only the room but not their bags, luggage, or under the sink.

For the Eighth Circuit to hold that the defendants' responses would have been inevitable under all other circumstances is nothing more than pure speculation.

The facts in the Petitioner's case show that the officers intentionally took illegal shortcuts around the Fourth Amendment in order to acquire the evidence admitted against the defendants. While surveillance was being conducted on the defendants in the restaurant, the officers elected to conduct an illegal search rather than proceed with either an application for a warrant or with a direct request for a consent to search from the defendants. There was no question that the two men in the restaurant were the same men the officers observed as the occupants of Room 222. It was only after the officers knew that both were preoccupied in the restaurant that they took their circuitous route to get inside their room. With the defendants in the restaurant, the officers then went to Room 123 and secured a third-party consent for the defendants' room from a reluctant Mary Stewart.

Even without discussing the legality and scope of Stewart's third-party consent, the fact that the officers sought Stewart's consent to search Room 222 as opposed to that of the Petitioner is highly suspect. The officers knew that the two defendants had a privacy interest superior to that of Mary Stewart as to the contents of Room 222. Based on hotel management's records which showed that Mary Stewart had rented two hotel rooms and the other facts known through their investigation, any reasonable officer would know that Stewart had no authority to authorize a search of the Petitioner's room nor his private luggage. There were no exigent circumstances that justified the decision to fail to obtain a warrant or directly ask the Petitioner to search his room. The Eighth Circuit justified the officers' conduct based on what they mystically predicted might have happened if the officers sought consent initially from the Petitioner rather than Mary Stewart. But the real question is why the officers sought consent from Stewart rather than from the Petitioner, when the Petitioner was no more than 200 feet away.

Constitutionality of Stewart's Consent

While not addressed by the Eighth Circuit, Mary Stewart's third-party consent to search was unconstitutional and is relevant here. Stewart simply lacked the authority to allow police to conduct a search of the defendant's luggage and the area underneath the bathroom sink, even if she had the authority to allow them to examine the room. Consent given by a third party is justified only if the third party has or exercises a "common authority" over the property. *U.S. v. Matlock*, 415

U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Common authority is defined by this Court in *Matlock* as: "Mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the other have assumed the risk that one of their number might permit the common area to be searched." *Id.* at n.7, 94 S.Ct. at 993.

As established earlier, Stewart never entered Room 222. In fact the only time Stewart had any sort of access or control over the room was during the hour after she rented the room and before she handed the key over to the Petitioner. The officers knew that the sole connection between Stewart and Room 222 was that she had rented the room using her own credit card. Stewart told the officers she did not have the authority to consent to search the room, and she told them on several occasions to wait and ask the Petitioner for his consent. She only gave that consent based upon the police officer's representation that she had the right to do so. In such cases, where police officers seek consent from a third party, entry is valid only when officers can reasonably believe the consenting party possesses the proper authority over the premises. Given the facts known to the police before their confrontation with Stewart, along with the facts revealed by her conversation with them, it was both devious and unreasonable to accept Stewart's substitute consent as valid. The acceptance of this invalid consent is even more objectionable when the defendants themselves in the hotel restaurant could have just as easily provided a genuinely valid consent. The use of Stewart's consent

by the officers was nothing more than a subterfuge to search the Petitioner's hotel room without his consent.

Constitutionality of the Initial Search of Room 222

Even assuming Stewart's consent was valid, the search of Room 222 and the Petitioner's personal luggage exceeded the scope of any such consent. It also violated the defendants' reasonable expectation of privacy. Applying the standard set forth in *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1962), the challenging party must show both a subjective expectation of privacy in the area searched and an objective showing of reasonableness that society is willing to accept. *Minnesota v. Olsen*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). The bag containing the drugs belonged to the Petitioner and not to Mary Stewart. Even if she had authority to consent to the search of the rooms, which she did not, she did not have authority to consent to the search of the bags belonging to the Petitioner. The drugs were not in plain view; steps were taken to secure the privacy of the bag by removing the panel underneath the sink and concealing it in the area behind it. This step by itself satisfies the first prong of the *Katz* test, as the area behind the panel was likely the one area in the hotel room that could not be easily accessed by maids or other employees of the hotel. Whether or not the Petitioner was theoretically allowed to make use of this area underneath the sink is not dispositive on either factor to determine a reasonable expectation of privacy. The interior of a hotel room accessible only to guests during their occupancy is presumed to be private and protected from unreasonable searches

and seizures. *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

As to the second prong of the "reasonable expectation" test, based on the precautions the men took to conceal the bag itself, society would also be willing to recognize the Petitioner's expectation as reasonable. By removing this panel during their warrantless search of the hotel room without his consent, the officers violated the Petitioner's expectation of privacy.

When the officers finally confronted the Petitioner in the hotel restaurant they had already found the cocaine in his room. They also anticipated that he would deny any connection to the cocaine in Room 222, as would anyone similarly situated. The officers then used this alleged abandonment by the defendants as a pretextual maneuver to eliminate any constitutional concerns over the validity of Stewart's consent, or of the scope of that consent.

When the police sought consent from Stewart to search Room 222, they were not actively pursuing any other alternative method of investigation at the time. Rather than going to the Petitioner and asking him for a legitimate consent to search, the officers continued to conduct surveillance on him. There is no question that the police knew the men sitting in the restaurant were the same men whose belongings were in Room 222. One of the officers watching the men in the restaurant had observed the men in Room 222 from the parking lot no more than one hour before.

The actions of the officers here were in bad faith. They purposely avoided contact with the Petitioner, even

though they were searching his room one floor above him.

The intentional use of constitutional shortcuts through the inevitable discovery doctrine was examined by the Sixth Circuit in *U.S. v. Griffin*, 502 F.2d 959 (6th Cir. 1974). In *Griffin*, while in the process of attempting to obtain a search warrant for a suspect's residence, federal agents broke into the residence and seized a quantity of drugs and paraphernalia. The warrant for the search arrived four hours after the actual search had taken place. The government relied upon the inevitable discovery doctrine to justify the initial warrantless search, but the Sixth Circuit held that "police who believe they have probable cause to search cannot enter a home without a search warrant merely because they plan subsequently to get one." *Id.* Because legitimizing such conduct would render meaningless the warrant requirement of the Fourth Amendment, the Sixth Circuit suppressed the evidence found in the warrantless search and seizure. This type of shortcut, willful disobedience of the warrant requirement, seems far more significant than the shortcuts envisioned by this Court in *Nix*.

This Court rejected the possibility of a "bad faith" limitation to the inevitable discovery doctrine in *Nix v. Williams*, expressing concerns over suppressing evidence that would have been available absent illegal activity, thus putting the police in a worse position. If the exclusionary rule is to maintain its deterrent function the only way to deter police from intentionally violating Fourth Amendment rights and justifying them after the fact is to prohibit them from profiting from their unlawful behavior.

More importantly, if the "inevitable discovery doctrine" is to enjoy constitutional credibility it must be applied only in those select cases where there is no doubt whatsoever that the evidence *will* inevitably be discovered no matter what.

In this case however, the Eighth Circuit has misapplied this doctrine. Their application of this doctrine to the facts of this case has now expanded it so greatly that it will be the rare case where the courts conclude that evidence could not have invariably been discovered.

Here police conducted an illegal search. After the fact they manipulated a disclaimer out of the Petitioner. They then used that disclaimer to rectify the illegality of their actions. Neither a verbal disclaimer nor a lawful discovery of the contraband could be characterized as being inevitable. The only thing inevitable about this case was the position in which it placed the Petitioner. It was inevitable that he was faced with the Devil's alternative. He could admit the room was his and give up his Fifth Amendment rights against self-incrimination or he could deny the room was his and give up his Fourth Amendment rights against warrantless searches. In either case because of the Eighth Circuit he would come out a loser and so would the Constitution.

CONCLUSION

This is an important case. The repercussions of this Eighth Circuit decision – if left unchecked – could change the very nature of police work in America. This decision creates a license for the police to engage in illegal

searches by giving them the expectation that no matter how unlawful their intrusions, a defendant's disclaimer after the fact will rectify their wrongdoing.

Police hereafter could invade a person's home or office, burst into his hotel room or apartment, and discover contraband without fear of any legal recourse. All they will be required to do is to simply ask the person if the contraband is his. Once the person denies it belongs to him the transgressions of the police will be automatically forgiven – and the Fourth Amendment will be in shambles.

This Court should not – it cannot – allow the police to conduct illegal searches and then justify their conduct – after the fact – by claiming that a defendant loses his Fourth Amendment protections because he refuses to incriminate himself by claiming ownership to the fruits of an illegal search. When an illegal search taints a later act of abandonment, the evidence obtained pursuant thereto should be suppressed as the fruit of the poisonous tree. Only the Supreme Court can stop the spread of this kind of poison.

Respectfully submitted,

JOSE LUIS MEZA-LOPEZ,
Petitioner

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Counsel of Record for Petitioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-3013

United States of America, *
Plaintiff – Appellee, *
v. *
Pablo Caballero-Chavez, *
Defendant – Appellant. *

No. 00-3173

United States of America, *
Plaintiff – Appellee, *
v. *
Jose Luis Meza-Lopez, *
Defemdant – Appellant. *

Appeals from the United States District Court for the District of Nebraska.

Submitted: April 19, 2001
Filed: August 13, 2001

Before BOWMAN, FAGG, and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

Defendants Pablo Caballero-Chavez and Jose Luis Meza-Lopez entered conditional guilty pleas to conspiring

to possess with intent to distribute over five kilograms of cocaine found in a duffel bag hidden in an Omaha hotel room rented for their occupancy by a drug courier. Caballero-Chavez and Meza-Lopez appeal the district court's[1] denial of their motions to suppress the cocaine. Concluding that they abandoned their interests in the hotel room and its contents, we affirm.

I.

The following facts are taken from the magistrate judge's thorough Report and Recommendation following a lengthy evidentiary suppression hearing. The defendants do not challenge any of the district court's findings as clearly erroneous.

In May 1999, the defendants hired seventy-year-old Mary Stewart to transport seven kilograms of cocaine from El Paso, Texas to Omaha. Stewart arrived at the Ramada Inn near the Omaha airport on June 1, driving a rented Pontiac Bonneville. She rented Room 123 and called the defendants, who asked her to rent an additional room. Stewart then rented Room 222 under her name, without telling the front desk who would be occupying the room. When the defendants arrived, Stewart gave them the key cards to Room 222 and the keys to the Pontiac. They paid her $6500 in cash.

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[1] The HONORABLE LYLE E. STROM, United States District Judge for the District of Nebraska, who approved and adopted the Report and Recommendation of the HONORABLE KATHLEEN A. JAUDZEMIS, United States Magistrate Judge for the District of Nebraska.

The next day, officers conducting a broad drug investigation learned from an intercepted telephone call that a male Hispanic staying in Room 222 at the Ramada Inn would be involved in a drug delivery at 8:00 p.m. that evening. When they went to the hotel to investigate, the Ramada's assistant manager told narcotics officers that Stewart had rented Rooms 123 and 222. Officers watched both rooms that afternoon and evening. They saw two Hispanic males through the window of Room 222 but no significant activity at either room. At 8:45 p.m., two Hispanic males drove out of the hotel parking lot in a Pontiac Bonneville with Texas license plates, but no officer had seen the men leaving Room 222. The two men returned at 9:20 p.m. and entered the hotel restaurant.

Shortly thereafter, the officers decided to contact the occupants of the two rooms. They first went to Room 222, but no one responded. They then went to Room 123, identified themselves to Stewart, and told her they were conducting an investigation. Stewart consented to a search of her room, during which the officers saw a large roll of cash in her open purse. After first denying she had rented more than one room, Stewart admitted she had rented Room 222 for two men whose names she did not know. The officers asked Stewart for her consent to search Room 222, telling her that, as the renter, she had authority to consent. Stewart reluctantly consented to a search of Room 222.

The officers advised the assistant manager of Stewart's consent to the search, and he let them into Room 222. They opened two luggage bags that had no identification tags, finding clothing, toiletries, and a cellular

phone they could not immediately link to their investigation. They also found a new screwdriver in the night stand drawer. When the assistant manager confirmed that the hotel did not provide screwdrivers, the officers searched for an area accessible by screwdriver, removed a wood panel from under the bathroom sink, and found a duffle bag with no identifying tags. They opened the duffle and found seven kilogram bricks of cocaine.

After finding the drugs and learning that a rental agreement for a Pontiac had been found in Room 123, the officers decided to restore Room 222 to its pre-search condition and speak to the two Hispanic males in the hotel restaurant, suspecting they were the occupants of Room 222 and hoping to obtain a confession. Two Spanish-speaking officers proceeded to the restaurant, where the defendants denied staying at the hotel and said they were there only to meet a lady named Maria. One officer recognized Meza-Lopez's voice from the intercepted phone calls, and one of the defendants produced keys to the rented Pontiac. The defendants agreed to show the officers Maria's room at the hotel. On the way to Room 123, they agreed to follow the officers instead to Room 222. Outside of Room 222, the defendants denied the room was theirs, denied they had ever been in the room, and said they did not care whether the officers searched the room because it was not their room. The officers then entered Room 222 with the defendants, who again denied any claim to the room or to the two luggage bags in the room. When they also denied ownership of the duffel bag hidden under the bathroom sink, the defendants were placed under arrest. This prosecution followed.

In denying defendants' motion to suppress, the district court resolved three issues in the government's favor: first, that Stewart voluntarily consented to the search of Room 222, and the officers reasonably believed she had authority to consent; second, that the defendants had no legitimate expectation of privacy in the area under the bathroom sink and therefore no standing to challenge the warrantless search of the duffel bag; and third, that the defendants abandoned their interest in Room 222 and its contents. Defendants challenge all three rulings on appeal. Given our disposition of the abandonment issue, that is the only issue we need address.

II.

If the defendants abandoned their interests in Room 222 and its contents, they no longer had legitimate expectations of privacy and are precluded from challenging the search of the room or the duffel bag on Fourth Amendment grounds. *See United States v. Hoey*, 983 F.2d 890, 892 (8th Cir. 1993). Whether property has been abandoned is a question of fact we review for clear error. In conducting that review, we "look to the totality of the circumstances, noting in particular two factors: whether the suspect denied ownership of the property and whether he physically relinquished the property." *United States v. Liu*, 180 F.3d 957, 960 (8th Cir. 1999). Abandonment "is determined on the basis of the objective facts available to the investigating officers, not on the basis of the [defendants'] subjective intent." *United States v. Tugwell*, 125 F.3d 600, 602 (8th Cir. 1997), *cert. denied*, 522 U.S. 1061 (1998).

In this case, when questioned in the Ramada restaurant, the defendants denied staying at the hotel. After voluntarily accompanying the officers to Room 222, the defendants denied the room was theirs and denied ever being in the room. When taken into Room 222, they denied that the luggage bags on the floor and a bed were theirs and then denied that the duffle bag under the bathroom sink was theirs. The officers did not find a key card to Room 222 when the defendants voluntarily emptied their pockets, and the bags in the room and under the sink bore no identifying tags. Given the defendants' repeated disclaimers, the district court's finding that they abandoned any interest in Room 222 and its contents is not clearly erroneous. *See United States v. Ruiz*, 935 F.2d 982, 984 (8th Cir. 1991) (officers may reasonably believe that a suspect's disclaimer of an interest in luggage is an abandonment of his privacy interest, even if they have other evidence of possession). That the abandonment occurred in response to an investigation of illegal drug activity does not render it involuntary. *United States v. Segars*, 31 F.3d 655, 658 (8th Cir. 1994), *cert. denied*, 513 U.S. 1099 (1995).

The defendants argue, however, that the cocaine found in the duffel bag must be suppressed because the illegal search of Room 222 and the duffel bag occurred prior to the abandonment of their property interests in the room and its contents. As presented, this argument has two distinct analytical components. First is a fruit-of-the-poisoned-tree component. The general principle is, "if an illegal search taints a subsequent act of abandonment, evidence acquired after the abandonment ought to be suppressed as the fruit of the unlawful search." *United*

States v. Washington, 146 F.3d 536, 537 (8th Cir. 1998), *cert. denied*, 121 S. Ct. 575 (2000). The principle as stated assumes that the alleged abandonment preceded seizure of the evidence to be suppressed because that has been the fact pattern in our cases raising this issue – allegedly illegal police conduct followed by abandonment followed by a contraband-discovering search. But the alleged illegal activity has often been a preliminary search that stopped short of discovery and seizure of the contraband, as in *Washington*. We noted in *Liu* that the principle applies "even if the abandonment followed an unlawful search." 180 F.3d at 961. Thus, in this case it does not matter that the allegedly illegal initial search of the duffel bag did not stop short of uncovering the secreted cocaine. The issue is whether the defendants' abandonment was an untainted "voluntary act of will" that left them with no interest justifying suppression of the seized cocaine. *Washington*, 146 F.3d at 537.

We conclude that the defendants' abandonment was a voluntary act untainted by the prior search of Room 222 and the duffel bag. Earlier that day, narcotics officers had intercepted a call suggesting that an Hispanic male would be involved in a drug delivery in Room 222. They observed two Hispanic males in the room and later saw two Hispanic males drive away from the hotel and return in a Pontiac. They found substantial cash and a rental agreement for the Pontiac in Room 123 after Mary Stewart told them she had rented Room 222 for two men. In these circumstances, as one of the officers testified at the evidentiary hearing, they would have gone to the restaurant and talked to the defendants even if they had not already searched Room 222 and found seven kilograms of

cocaine. That hypothetical conversation in the restaurant would have been substantially similar to what actually occurred, since one officer recognized Meza-Lopez's voice from prior wiretapped phone calls. And it is a virtual certainty that the defendants would have responded by abandoning their property interest in Room 222 and its contents, because their actual decision to abandon was made without knowledge that the officers had searched Room 222 or found hidden cocaine. Thus, the prior search did not taint the abandonment. *Compare United States v. McDonald*, 100 F.3d 1320, 1328 (7th Cir. 1996), *cert. denied*, 520 U.S. 1258 (1997). Indeed, the circumstances are such that the inevitable discovery doctrine reinforces the district court's abandonment finding, as it did in *United States v. Chandler*, 197 F.3d 1198, 1200-01 (8th Cir. 1999).

The second component of the defendants' argument is based on cases that have labeled abandonment an aspect of Fourth Amendment standing. Defendants cite *United States v. Colbert*, 474 F.2d 174, 177 (5th Cir. 1973), where the court observed:

> When the time of possession charged and the time of the search coincide or overlap, it is indeed inconsistent for the government to argue the defendant lacked sufficient possession [of contraband] to confer standing to challenge the search but had sufficient possession at the same time for conviction. When, however, the government shows that the property was abandoned before the search, there is no such inconsistency.

But this passage was intended to distinguish the post-abandonment search in *Colbert* from the Supreme Court's

"automatic standing" doctrine adopted in *Jones v. United States*, 362 U.S. 257 (1960). When *Jones* was overruled in *United States v. Salvucci*, 448 U.S. 83 (1980), the above-quoted dicta in *Colbert* lost its force. *See also Rakas v. Illinois*, 439 U.S. 128, 140 (1978) ("dispensing with the rubric of standing" in Fourth Amendment cases). Defendants also cite *United States v. Morales*, 737 F.2d 761, 764 (8th Cir. 1984), which included language suggesting that a suspect's disclaimer of ownership may not be used to deny Fourth Amendment standing to challenge a search when the suspect is charged with unlawful possession of contraband discovered in the search. But *Morales* simply rejected the government's attempt to argue an abandonment theory for the first time on appeal. Reading the discussion in *Morales* more broadly, as the defendants urge, would be inconsistent with our later decisions in *Washington* and *Liu*. *See also United States v. Gomez*, 16 F.3d 254, 256-57 (8th Cir. 1994), which read *Morales* narrowly.

III.

Having upheld the district court's finding that Caballero-Chavez and Meza-Lopez abandoned their Fourth Amendment interests in Room 222 and the cocaine found in the hidden duffel bag, we need not address the court's alternative grounds for denying their motions to suppress. The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3173

United States of America,	*	8:99CR145
Appellee,	*	Appeal from the United States District Court for the District of Nebraska
vs.	*	
Jose Luis Meza-Lopez,	*	
Appellant.	*	

JUDGMENT

(Filed Oct. 9, 2001)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

August 13, 2001

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. PABLO CABALLERO-CHAVEZ and JOSE LUIS MEZA-LOPEZ, Defendants.	8:99CR145 MEMORANDUM AND ORDER (Filed May 2, 2000)

This matter is before the Court on the report and recommendation of the magistrate judge (Filing No. 80), Jose Luis Meza-Lopez' "statement of objection to magistrate's report and recommendation, request for evidentiary hearing, and request for oral argument" (Filing No. 89), and "defendant Caballero's statement of objection to magistrate judge's recommendation and supporting brief" (Filing No. 100). The defendants raise three principle [sic] objections to the magistrate judge's report and recommendation. They object to the magistrate judge's finding (1) that the officers were reasonable in believing that Mary Stewart had authority to consent to the search; (2) that the Defendants could not establish any legitimate expectation of privacy in an area underneath the bathroom sink; and (3) that the defendants abandoned their interest in Room 222 and its contents and thus had no reasonable expectation of privacy.

The Court, pursuant to 28 U.S.C. § 636(b)(1)(C), has conducted a *de novo* review of the motions of the defendants, the transcripts of the hearings on the defendants' motions (Filing Nos. 39 and 51), the exhibits presented during the course of those hearings, the objections of the defendants, and the supporting briefs filed by defendants in support of their objections. Having conducted the review of the transcripts and the briefs of the parties, the Court is satisfied that no further evidentiary hearing or oral argument is necessary, and neither party has identified any further evidence which they believe ought to be offered in support of their respective positions. For these reasons, that request will be denied.

The Court finds that the magistrate judge thoroughly reviewed and set forth the evidence relating to these issues, and the Court will not repeat those findings in this opinion. The Court further finds that the magistrate judge's legal analyses with respect to the voluntariness of Mary Stewart's consent, her consent to search the vehicle, and her consent to search Room 222 is correct and should be approved and adopted by the Court.

The only other issues is whether the defendants had abandoned Room 222 and its contents. Defendant Meza-Lopez raises the issue that their denial of any interest in Room 222 and its contents was made after the room had been searched by the officers and, therefore, the doctrine of abandonment does not apply. In view of the court's finding that Mary Stewart had the authority and voluntarily consented to the search, this issue of abandonment is not significant. In any event, considering the facts and circumstances of this case, the Court is satisfied that the magistrate judge's analyses of abandonment as applied to

this case is correct and should be approved and adopted by the Court.

The defendant Pablo Caballero-Chavez' motion "for pretrial hearing concerning coconspirator statements" (Filing No. 47) is still pending. Hearing on that motion will be scheduled by the Court in this memorandum and order. Accordingly,

IT IS ORDERED:

1) The report and recommendation of the magistrate judge (Filing No. 80) is approved and adopted;

2) The motion of Pablo Caballero-Chavez to suppress evidence (Filing No. 32); motion of Jose Luis Meza-Lopez to suppress fruits of the search (Filing No. 33); motion of Pablo Caballero-Chavez to suppress search of Pontiac Bonneville (Filing No. 43); motion of Pablo Caballero-Chavez to suppress evidence seized from defendant's person (Filing No. 44) and motion of Pablo Caballero-Chevez to suppress evidence seized from arrest at restaurant of hotel (Filing No. 45) are denied;

3) Objections of defendants and request for evidentiary hearing and oral argument (Filing Nos. 89 and 100) are denied.

4) Hearing on defendant Pablo Caballero-Chavez' motion is set for hearing on:

Tuesday, May 9, 2000, at 10 a.m.

5) Trial of this matter is scheduled for:

Monday, May 15, 2000, at 9 a.m.

DATED this 2nd day of May, 2000.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Senior Judge
United States
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. PABLO CABALLERO-CHAVEZ and JOSE LUIS MEZA-LOPEZ, Defendant.	8:99CR145 REPORT AND RECOMMENDATION (Filed Feb. 8, 2000)

Defendants were indicted in July of 1999 for possession with intent to distribute cocaine in violation of 21 U.S.C. § 841. During the formal arraignments, the court was advised that a critical issue in the case was the legality of the search of the defendants' hotel room where the cocaine was discovered. The court agreed to schedule an early hearing on that issue. On September 8, 1999, one consolidated evidentiary hearing was held on the Motion to Suppress Evidence (#32) and Motion to Suppress Fruits of Search (#33). At the hearing, the court agreed to take judicial notice of the transcript (#18) of the preliminary hearing. The transcript (#39) was filed on September 21, 1999. The consolidated evidentiary hearing was continued on September 24, 1999, and the transcript (#51) was filed October 7, 1999. By agreement of the parties, post-hearing briefs were ordered to be simultaneously submitted on November 12, 1999 (#53).

Subsequent to the September 24, 1999 hearing, defendant Pablo Caballero-Chavez filed a Motion to Suppress Search of Pontiac Bonneville (#43), Motion to Suppress

Evidence Seized from Defendant's Person (#44) and Motion to Suppress Evidence Seized from Arrest at Restaurant of Hotel (#45). Those motions came on for a consolidated evidentiary hearing on December 15, 1999. Upon the defendant's oral motion, the court agreed to take judicial notice of the earlier transcripts (#18, #39 & #51) in deciding these motions. The transcript (#70) of the December hearing was filed December 21, 1999. All of the pending motions (#32, #33, #43, #44, & #45) were deemed at issue on December 21, 1999.[1]

On December 15, 1999, both defendants initially appeared and were formally arraigned on a superseding indictment charging the defendants with conspiracy to distribute cocaine and possession with intent to distribute cocaine in violation of 18 U.S.C. § 2 & 21 U.S.C. §§ 841 & 846. At defendants' request, a pretrial motion deadline of January 14, 2000 was set. (#68). Defendant Caballero-Chavez has now filed a motion requesting the deadline be extended.

FACTUAL BACKGROUND

1. Summary of Incident and Issues Presented

The incident in question arises out of a broader investigation being conducted jointly by federal and state

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[1] Although the Motion to Suppress Fruits of Search (#33) filed by Jose Luis Meza-Lopez was deemed at issue upon the receipt of briefs on November 17, 1999, because defendant Meza-Lopez is joined with defendant Caballero-Chavez, under the Speedy Trial Act, the running of time was calculated for both defendants together.

law enforcement officers. The broader investigation involved a wire tap on the cellular phone of Saul Rodriguez and a wire tap on a telephone in a local tavern, Las Jarras, in Omaha, Nebraska. As a result of intercepted telephone calls and surveillance at Las Jarras bar, officers knew that Jose Luis Meza-Lopez was in Omaha. Officers learned that at least one person was staying at the Airport Ramada Inn and that Room 222 was involved. A meeting had been set for 8:00 p.m. with "the lady."

Police set up surveillance at the Ramada Inn. Through the manager, they learned that Room 222 was rented by Mary Stewart on June 1, 1999. She also rented room 123. The hotel advised officers that one person was residing in Room 123, and two people were residing in Room 222. Officers contacted Mary Stewart in Room 123. They obtained her consent to search Room 123, Room 222, and a Pontiac Bonneville which Mary Stewart had driven from Texas to Omaha, Nebraska.

Stewart's authority to provide consent to search Room 222 and the Pontiac Bonneville are at issue. Pablo Caballero-Chavez contends that Mary Stewart did not have authority to consent to the search of the Pontiac Bonneville. He argues that the keys to the Bonneville had been given to him and Meza-Lopez at the time that the search was effected. Both defendants argue that Mary Stewart did not have sufficient control over Room 222 to give valid consent for its search.

Room 222 was not occupied. The hotel manager let the officers into Room 222 upon their representation that Mary Stewart, the renter of the room, had given them permission to search it. Once in the room, the officers

searched luggage which belonged to the defendants. A screwdriver was found in a nightstand. The officers observed that the panel underneath the sink in the bathroom was affixed by screws. Upon removing it, the police found a zippered shut duffle bag which contained a substantial quantity of cocaine. The hotel manager testified that the Ramada Inn does not allow guests access to the area under the sink which is why it is enclosed with a panel and screws. The government has raised as an issue the legal basis of the defendants' challenge of the search under the sink, arguing that the defendants had no reasonable expectation of privacy in an area from which they were excluded by the hotel.

Officers first contacted Meza-Lopez and Caballero-Chavez when they were in the hotel's restaurant after Room 222 had been searched. Defendant Caballero-Chavez contends that this contact effectively placed him in custody. He argues that his person was seized and he was unlawfully searched by the officers. Both men accompanied the officers to Room 222. Both men denied any association with the room. Once inside of the room, the men denied staying in the room and denied that the luggage was theirs. When shown the blue duffle bag under the sink, both men denied ownership. The government argues that, by this conduct, defendants abandoned the hotel room, the luggage, and the hidden cocaine so that they cannot now challenge the lawfulness of the searches and seizure.

2. Ramada Inn Records

Shane Rothmeyer testified that he has worked at the Airport Ramada Inn in Omaha, Nebraska for six years. On June 2, 1999, he had been the assistant manager of the motel for a little over one year. Prior to that, he had been employed as the night auditor. His duties are to oversee the hotel and insure that things are running properly. He has full authority to run the hotel when he is present. With respect to the events which occurred on June 2, 1999, he did not ask permission from anyone else either in his direct chain of command or at the corporate offices.

Rothmeyer testified that the keys to the guest rooms at the motel do not have room numbers on them. Instead of actual keys, guests are issued magnetic cards. It is the policy of the hotel to give keys to the persons who are registered to a particular room. The hotel gives the individual registering the number of keys requested at the time of registration. In order to obtain additional keys at a later time, the individual would have to provide identification which matched that of the person registered in the room to get a key. A person registered could also come to the front desk with another individual and authorize the front desk to give the other individual a key to the room.

Upon registration, the hotel takes an imprint of the guest's credit card. The credit card is used to pay for the room if the person does not make alternate arrangements at the time of check out. Long distance charges or charges in the bar and restaurant would also be posted to the room's account and charged to the credit card if the guest did not make alternate arrangements. After check out, if

the hotel discovered any damage to the room, the cost of repairs would be the responsibility of the person who rented the room, and the charge would be added to that individual's credit card.

Rothmeyer testified that hotel records (Ex. 2) indicated that the desk clerk on duty at the time that Mary Stewart checked in on June 1, 1999 was Angie. Rothmeyer did not know what Angie had told Mary Stewart regarding the hotel's policy for charges or the policy on how many keys were issued.

The hotel records indicated that one person was checked into Room 123, and two adults were checked into Room 222. Mary Stewart rented both rooms. However, the hotel records (Ex. 1) do not indicate when Mary Stewart rented Room 222. Rothmeyer was contacted by Omaha Police Sgt. Fidone. Fidone knew the name "Mary Stewart" and asked for her room number. Rothmeyer knew that Mary Stewart was personally staying in Room 123 and that was the room number that he gave to Sgt. Fidone.

Sgt. Fidone asked about telephone calls made to or from the room. Rothmeyer ran a printout of telephone calls made from all of the rooms of the hotel and highlighted on that list calls made from Rooms 123 and 222, explaining to Fidone that Mary Stewart had rented both rooms. Rothmeyer told Fidone that two other persons were occupying Room 222. There was nothing in the hotel records which indicated that either Jose Luis Meza-Lopez or Pablo Caballero-Chavez were guests at the Ramada Inn. There was no record kept of the number of keys issued to Mary Stewart for either Room 123 or Room 222.

At approximately 5:00 to 6:00 p.m. that evening, Rothmeyer stood at the end of the hallway while police officers walked a drug dog past Room 222.

Several hours later at approximately 9:30, Sgt. Fidone advised him that Mary Stewart had given the officers permission to search Room 222. Sgt. Fidone asked for Rothmeyer to let police into the room. Rothmeyer agreed to do so on the basis of Fidone's representation that officers had received permission from Mary Stewart.

Rothmeyer testified that he opened the door to the room and the officers entered. At first they looked around the room to determine who was staying in it. There were approximately three to four bags in the room, one which was opened, and the rest closed. The officers looked through the bags and in the desk drawers of the furniture located in the bedroom area. One of the officers found a screwdriver in the nightstand and asked Rothmeyer if it was owned by the hotel. Rothmeyer told the officer that it was not.

The officers went into the restroom of the room approximately five to ten minutes after the room had been entered. There was a wood panel underneath the sink which is secured to the sink with four screws. Rothmeyer testified that that area is not one to which the hotel permits guests to have access. The panel protects the room's plumbing and the shut off valves.

It took the officers approximately two minutes to take the four screws out of the panel and move the panel aside. A blue duffle bag was found hidden behind the panel, and the officers looked inside of it.

3. Transportation of Drugs to Omaha

At the September 8 hearing, Mary Stewart testified that she had reached an agreement with the government. In exchange for her agreement to testify against the defendants, she was charged with a state court felony to which she had pled guilty. There was no agreement with respect to any possible sentence.

In the preliminary examination hearing[2], Mary Stewart testified that she was 70 years old and a resident of California. She flew to El Paso, Texas where she was picked up by defendant Jose Luis Meza-Lopez at a hotel. He drove her to Juarez, Mexico where the two of them met with others and had dinner. The next day defendants Meza-Lopez and Caballero-Chavez picked up a car she had rented in Texas. They returned it to her later the same day with the cocaine. She was given $500 for her expenses by Meza-Lopez. Her instructions were to drive the vehicle to Omaha, Nebraska. The men told her that they would be coming to Omaha.

She arrived in Omaha from Texas on Tuesday, June 1 and rented a room on the first floor of the motel for one night using her credit card. Only one key was issued to her. After checking into her room, she made two telephone calls to a telephone number that she had been given when she was in Texas. She did not recognize the man who answered. She advised him who she was and told him that she had arrived in Omaha, checked into the

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[2] The court took judicial notice of the evidence at the preliminary examination upon the motion of defendant Meza-Lopez.

Ramada Inn and gave him her room number. He instructed her to rent him a room, which she agreed to do.

She understood that her instructions were to rent a room for the night of June 1. She did so at the desk using her credit card. She could not recall how many keys she obtained from the desk. She did not give the desk any other names for the room, nor did she tell them that she was already a guest there. She did tell the clerk that she was renting the room for two people. The she went back to her room and rested.

In the evening of June 1 at approximately 9:20 p.m., she met with defendants Meza-Lopez and Caballero-Chavez at the side door of the parking lot at the Ramada Inn. She gave the two men the key(s) to Room 222 and the keys to the rental car. She then went back to her room. Approximately one hour later, there was a knock at her door. Meza-Lopez gave her sixty-five hundred dollars in cash which she placed in her purse.

The next day, Wednesday, June 2, at approximately mid-morning, both defendants came to her hotel room. They told her that they wanted to stay in Omaha another day and asked her to extend the room rental for one more day. She reminded them that they had to return the keys to the rental car to her since she was to drive it back to Texas. She advised them that they had shorted her $500 in the money she was promised. The men counted the money they had given her the night before. They told her they would see her later that day and they would make it right. After they left, Mary Stewart testified that she went back to the hotel office. Using her credit card, she rented

Rooms 123 and 222 for a second night. She testified that she had no other contact with the defendants.

Mary Stewart testified that neither defendant ever gave her any instructions with respect to Room 222. She understood the two men would be staying in Room 222, and she kept no keys to the room for herself. She was never told not to go into the room, nor not to allow the police to go in the room. When she initially rented the rooms and when she extended the stay for each of the rooms, she did not provide the staff of the Ramada Inn the names for who would be staying in each of the rooms, nor did she ever identify which of the rooms she was staying in. She understood that she was responsible for the room charges for Room 222 and any damage to Room 222.

FBI Agent Gilbert Balli testified that he had been an FBI agent for one and one-half years. Prior to that, he had been a member of the United States Border Patrol. He is a native speaker of the Spanish language and is fluent in speaking, reading and listening to Spanish.

Agent Balli testified that the investigation began in late 1998 of an individual named Saul Rodriguez. Eventually, the police established a wire tap on Rodriguez's cellular phone and then later on a telephone assigned to Las Jarras bar in Omaha, Nebraska. The week prior to these arrests, monitors had intercepted a conversation between Saul Rodriguez and Jose Luis. Rodriguez was being advised that the next day an individual would be leaving and traveling to Omaha, Nebraska. Based on that conversation, Balli concluded that drugs were being sent to Saul Rodriguez.

On June 2, 1999, monitors listening to the wire tap alerted Agent Balli to conversations which had occurred in the Spanish language. He listened to the conversation and recognized the men speaking as Saul Rodriguez and an individual known as "Jose Luis". The conversation also involved a third unidentified individual staying at the Airport Ramada Inn in Omaha, Nebraska in Room 222. Jose Luis stated that they were planning to set up a meeting for 8:00 p.m. with "the lady" and talked about "a watch." Agent Balli testified that, based on what he heard of the conversation, he believed a drug transaction was to occur at 8:00 p.m. He believed that some persons at the Ramada Inn were involved.

4. Investigation at Ramada Inn

Omaha Police Sgt. Ray Fidone testified that he is assigned to the Narcotics Squad. At approximately 6:00 p.m. on June 2, 1999, he received a telephone call from Agent Balli. An intercepted telephone conversation had led Balli to believe that a meeting was being set up at the Ramada Inn at the airport at approximately 8:00 p.m. that evening. A Hispanic male could be involved, and it was believed that Room 222 was involved. He was not told about anyone named "Mary Stewart." Fidone had been involved in the investigation for approximately the last month and a half and knew that it involved Hispanic persons living in the Omaha area.

At 6:15 p.m., Fidone arrived at the Ramada Inn where he met Omaha Police Officer Gonzalez. Later, they were joined by additional law enforcement officers.

Gonzalez and Fidone went to the manager and identified themselves as Omaha police officers. They asked for information on Room 222 and received the registration. From the registration they learned that an individual named Mary Stewart had rented both Room 222 and Room 123. They were also given a printout of all of the telephone numbers, but initially that had no meaning. The manager told them that there was a white female residing in Room 123, and it was possible that she had a guest. The manager did not have any information on Room 222's residents. The officers were told that there was one other Hispanic family residing in the hotel.

The manager escorted Gonzalez and Fidone to the area of Room 123. The officers determined that they would be able to conduct surveillance on the back door of that room number from the pool area of the hotel. They then walked past Room 222 in the public hallway.

Gonzalez and Fidone went back to the lobby where the rest of the officers arrived. Fidone made surveillance assignments. He posted officers in the hallways of each room in five minute rotations. As one officer began watching the hallway, the other officer would leave and return to the lobby. A Hispanic male was observed in the gift shop, and, for a period of time, officers watched that individual. Officer Hadcock was posted to the Ramada Inn's parking lot where he could watch the window of Room 222. The curtains were opened only about twelve inches. Hadcock reported seeing one Hispanic male, clean shaven, approximately in his 20's or 30's. He was wearing a black shirt. Later, Hadcock reported seeing a second party in the room, also male, wearing a lighter colored shirt. At approximately 6:30 p.m., telephone calls

were placed to both rooms. There was no answer at Room 123. A Hispanic male answered Room 222, and the officer indicated that he had misdialed and hung up.

The surveillance continued until 8:00 p.m. The officers had obtained no information on Room 123 or its resident, and no one was observed in the hallway outside of Room 222. Nothing appeared to be happening, and the officers did not observe anything which looked like the expected meeting. At about this time, a Hispanic family entered the lobby, sat down and began watching television. For a period of time, the officers watched them. One of the offers then contacted the manager. The manager identified the individuals as the Hispanic family who was staying in the hotel.

By 8:30 p.m., Agent Balli had arrived. Sgt. Fidone testified that he showed the previously obtained telephone records to Agent Balli. Balli recognized the number of the cellular telephone on which there had been a wire tap. That cellular telephone number was called from room 222. Sgt. Fidone called for a canine officer to come to the hotel. Officer Gonzalez testified that he was sitting in the lobby waiting for the arrival of the drug dog officer when he saw two Hispanic males walk through the lobby and leave the hotel. One was wearing a dark shirt and one was wearing a light shirt, consistent with the description of the two Hispanic men observed in Room 222 by the officers stationed in the hotel's parking lot. Two officers in the parking lot were waiting for the canine unit to arrive when they saw two Hispanic men walk out of the hotel and go to a dark green Pontiac Bonneville with Texas license plates. None of the officers in the hotel had seen where the men had come from. The men got into the

vehicle and drove off. The officers did not follow the Bonneville.

The canine officer arrived at approximately 9:00 p.m. The drug dog was walked in the public hallways past Rooms 222 and 123. The dog did not alert to either room. The officers all congregated out in the parking lot, and the deputy and drug dog drove away at approximately 9:20 p.m. Approximately two minutes later while the officers were still in the parking lot, the Pontiac Bonneville returned with the same two men in it. Fidone was able to see the men for the first time. The book in photos (Ex. 7 & 8) show the men wearing the same clothing that Fidone saw them wearing when the men drove into the parking lot in the Bonneville and walked into the hotel. The two men later identified as Meza-Lopez and Caballero-Chavez went directly into the restaurant. Officers Hadcock and O'Brien were posted outside of the restaurant to conduct surveillance.

Agent Balli and Sgt. Fidone decided on what they termed "the direct approach." They decided that they would knock on the doors to each room and ask for permission to search the rooms from the occupants. Agent Balli and Officer Gonzalez initially went to Room 222. They knocked on the door, but there was no answer. The officers then decided to approach Room 123. Because they understood from the management that a woman was in the room, Officer Catherine Milone accompanied Gonzalez and Balli while Sgt. Fidone watched the back door of Room 123 from across the pool area.

5. Contact With Mary Stewart in Room 123

a. Mary Stewart's Testimony

Mary Stewart testified at the preliminary examination held July 1, 1999 (#18) and at the first hearing on the motions to suppress held September 8, 1999 (#39). The summary of her testimony is taken from both of the hearings.

Mary Stewart testified that there was a knock on her door in the evening. When she looked out of the peep hole, she saw two men and one woman. None of them were dressed in uniform. The woman identified herself as an Omaha police officer and held up her badge to the door. She told Stewart that they wanted to talk to her about an ongoing narcotics investigation and drugs which were in her room. Steward told them that there were no drugs in her room and invited them in, opening the door. The officers asked her why she was in Omaha, and she initially told them that she was there for her daughter's graduation. However, when they asked her which school, she could not come up with the name. Eventually she said her daughter was graduating from the University of Nebraska.

Stewart testified that her purse was sitting open on a counter in the bathroom. She had placed in it the sixty-five hundred dollars in United States currency that the men had given her the night before. The bills, twenties and fifties, were sitting on top of her purse, and the money was visible.

The officers began questioning her about Room 222, telling her they knew that she had rented the room. They

wanted to know why she was in Omaha and why she had rented a second room. She admitted renting Room 222 and indicated that she had rented it for two other people, both men. Mary Stewart testified that she was very uncomfortable when the officers asked her about consenting to search Room 222. She testified that she told the officers several times that they should wait until the men arrived back at the room and that she was sure that the men would cooperate with the officers. She testified that she tried to stall the officers by encouraging them to wait until the men came back. Mary Stewart testified that she was sure the men had removed the drugs from the car, and she did not believe that any of the drugs had been taken to their rooms. For that reason, she expected that the men would give the officers permission to search Room 222. Mary Stewart confirmed that she told the officers that they could search Room 222. She said that no threats or promises had been made to her. She had not been arrested, nor had she been handcuffed. While she saw that Gonzalez and Milone had guns, the guns were in their holsters and were never drawn. No voices were raised. She was very nervous during the encounter and very worried that the officers would learn about her participation in the drug transportation.

b. Officer Gonzalez's Testimony

Officer Gonzalez testified that, when the three officers went to Mary Stewart's room, Stewart gave Officer Milone permission to enter the room and to search the room. Gonzalez, who was standing in the hallway listening to the conversation, heard Stewart grant that permission. Balli, who was standing near the door to the room,

pointed out to Gonzalez the money sitting in the open purse on the bathroom counter. Gonzalez then walked into the room looking around it but touching nothing while Stewart and Milone continued to have a conversation.

Gonzalez testified that initially Mary Stewart denied having rented the second room when she was questioned about it by officer Milone. Hearing Stewart's denial, Gonzalez went up to Milone and told Milone that Sgt. Fidone had checked with the desk and learned that Stewart had rented Room 222 with her credit card. Gonzalez testified that Milone already knew this information. Gonzalez said it aloud to Milone in front of Stewart so that Stewart would know that the officers had conducted an investigation and knew that she was lying. Only after Gonzalez talked to Milone did Stewart admit renting the second room. Stewart admitted that she had rented the room for two Hispanic men who were staying in the room.

Milone then asked Stewart for permission to search Room 222. She claimed not to know who the men were who were staying in the room and told officers she did not know if she could allow the search.

Officer Gonzalez testified that, when he heard Mary Stewart talking about Room 222, she was asking Officer Milone whether she could give the officers consent to search the other room. Gonzalez told Stewart that if she was renting both of the rooms under her own name and with her own credit card, then she could give the officers permission to search the room. Gonzalez said approximately ten minutes passed between the time when they

first made contact with Mary Stewart and when she gave the officers permission to search the room.

Officer Gonzalez testified that Agent Balli left when consent to search Room 222 was given but that he remained in the room with Officer Milone and Mary Stewart. Mary Stewart sat at a chair near the table of the room, and she and Officer Milone had a casual conversation. Mary Stewart described the conversation as an exchange of pleasantries. While the two of them were talking, Officer Gonzalez searched the room. During his search of Room 123, Gonzalez found a rental agreement for a vehicle. The vehicle description matched the green Pontiac Bonneville that the officers had seen the two Hispanic men drive into the parking lot earlier that evening.

Officer Gonzalez testified that he left to contact the men in the restaurant with Agent Balli. When he returned to Room 123, he told Mary Stewart that drugs had been located in Room 222. She told him that the drugs had never been in her room and that she wanted to talk to him. He told her that he could not talk to her until after he had been advised of her *Miranda* rights, and he proceeded to advise her of her *Miranda* rights orally. During this second conversation, he also discussed with her the search of the vehicle described in the rental agreement. She agreed to give officers permission to search the vehicle. She had already given officers permission to search Room 222 and her own room. The permission to search Room 123 and the vehicle was memorialized in a written Omaha Police Department Permission for Search form (Ex. 3). Officer Gonzalez testified that the Permission for

Search form was executed after Sgt. Fidone and Agent Balli had found the drugs in Room 222.

c. Officer Catherine Milone's Testimony

Catherine Milone testified that she contacted Mary Stewart along with Gonzalez and Balli. She identified all of them as police officers, holding up her patch to the peep hole. Mary Stewart opened the door after they had introduced themselves. When Milone asked if they could come into the room, Mary Stewart said yes and invited them in.

The initial conversation with Mary Stewart was held when they were just inside of the door. The door was open, and Catherine Milone told Mary Stewart that they were there to investigate narcotics activity. Mary Stewart appeared surprised and told the officers that there were no drugs in her room. Milone asked if they could search her room, and Mary Stewart said they could, opening the door all the way. At that time, Agent Balli walked into the room, and Officer Gonzalez first crossed the threshold. Milone and Stewart remained in the entryway, talking.

When Officer Milone asked Mary Stewart why she was at the motel, Stewart responded that she was there for her daughter's graduation. However, she was not able to tell them the school her daughter had graduated from. Stewart told Milone that she had traveled to Omaha in a motor home. Milone testified that the story she was being told did not make any sense. She then asked Mary Stewart if she had rented any other rooms, and Stewart responded that she had not. Milone knew that this was

not true, because she had learned from Officer Fidone that Stewart had rented two rooms.

Milone testified that, when they asked Stewart for permission to search Room 222, Stewart told them that it was not her room, and she did not know if she could give permission. The officers told her that she was able to give permission since she was the one who had rented the room. Stewart then told them to wait for the two Hispanic men to come back to the room, because she was sure that the men would give them permission to search the room. The officers again told her that she was able to give the officers permission since she had rented the room, but also told her that she did not have to give permission to search Room 222.

Officer Milone testified that, as soon as Mary Stewart gave consent for the search of Room 222, Agent Balli left. At the time that consent was given, no promises or threats had been made, and no weapons had been drawn. Mary Stewart had not been arrested. She seemed to understand the conversation and seemed coherent.

Officer Milone testified that she was the one who had filled out the original of the consent form (Ex. 3). She listed Room 123 and the vehicle but, in error, did not list Room 222. The information about the vehicle was taken from a rental agreement that Officer Gonzalez found in Mary Stewart's daily planner. Milone testified that she stayed with Stewart in the room during the entire evening. Mary Stewart was not removed from the room until approximately an hour and a half after the officers first entered. During that period of time, Mary Stewart

never revoked her consent to search her room, Room 222, or the automobile.

6. Initial Search of Room 222

Agent Balli testified that he left Stewart's room as soon as she gave them oral permission to search Room 222 and contacted Sgt. Fidone by telephone or radio. He told Fidone that Stewart had given them oral consent to search Room 222. Balli then met Fidone and the hotel manager at Room 222. Fidone had explained to the manager that Mary Stewart had given the officers consent to search Room 222, so the manager opened the door to the room and allowed the officers to go inside.

Shane Rothmeyer testified that Sgt. Fidone came to the desk and advised him that Mary Stewart had consented to the search of Room 222. He accompanied Fidone to Room 222 where they were met by Agent Balli. Using his pass key, Rothmeyer let both officers into Room 222.

Rothmeyer testified that the officers initially looked around the room for identification to determine who the occupants of Room 222 were. They looked in the desk drawers and the nightstands. In one of the nightstands, a screwdriver was found. The officers asked Rothmeyer of it was owned by the hotel or issued by the hotel, and Rothmeyer reported that it was not. Rothmeyer testified that the officers then looked through the luggage, searching three or four bags which were found in the main part of the room.

Agent Balli testified that officers initially searched the room for identification but found none. They saw glasses and grapes on the table and found two soft sided duffle bags, one on a bed and one the floor by the nightstand. Sgt. Fidone searched one of the bags and found inside of it a cellular telephone which he replaced in the bag. The bag on the floor which was zipped closed was also searched. In it was found clothing but no identification.

During a search of the nightstand, Sgt. Fidone found a screwdriver which looked brand new. The manager said that the hotel did not issue screwdrivers to hotel guests.

The officers went inside of the bathroom where they looked at the cabinets underneath the sink. Officer Fidone testified that, using the screwdriver he had found, he took off the two panels underneath the sink. Hidden behind the panels was a soft sided blue duffle bag approximately eighteen inches long. It was zippered shut and had two loop handles. He pulled the duffle bag out of the sink area and unzipped it. Inside he found seven brick shaped packages weighing approximately one kilogram each. He immediately recognized the packages as controlled substances.

While in Room 222, Fidone received a telephone call from Officer Gonzalez. He had counted the currency in Mary Stewart's purse and told Fidone how much he had found. He also advised that rental papers for a Pontiac Bonneville with Texas plates had been found in her personal possession. Gonzalez told Fidone that the car described in the rental papers was the same vehicle which the men had driven into the parking lot.

Fidone and Balli discussed their next step. They decided that they would put the narcotics back into the blue duffle bag, zipper it and place it back in its location under the sink. They replaced the two panels. They then went back into the main room and returned the room to its original state. Their plan was to contact the two men in the restaurant and ask them for permission to search Room 222, pretending they had not already been inside of the room. They intended to do this as a ruse. Fidone would stay in the room while Balli would go down to the lobby to make contact with the men. When Fidone was advised that Balli was on his way back to Room 222, he would step outside of the room and meet the rest of the group in the hallway. The door to Room 222 would be locked.

7. Contact in Restaurant

Pablo Caballero-Chavez argues that he was in custody during the entire contact at the restaurant. He contends that all of the statements he made must be suppressed because he had not been advised of his *Miranda* rights and that none of the statements made were voluntary.

Sgt. Fidone testified that Officers Hadcock and O'Brien had been on surveillance outside of the restaurant in order to be able to watch the two men should they leave the restaurant. However, neither man had left the restaurant at the time that Fidone and Balli determined that Balli would go to the restaurant to make contact with them.

Gonzalez and Balli met first in the lobby where Balli told him about the controlled substances discovered in Room 222 and the ruse that he and Fidone were going to attempt. They saw the two men in the restaurant eating. He and Gonzalez intended to approach the men to determine if they were the same two Hispanic men that were connected to Room 222.

Balli testified that he and Gonzalez approached the men and identified themselves speaking in the Spanish language. They asked if they could sit down at the table. One of the men said yes. The other asked why Balli and Gonzalez had approached them, suggesting that it was only because they were Hispanic. Balli responded that there was no reason for he and Gonzalez to do so since they were also Hispanic. Balli asked for identification, and each man provided him with identification. After looking at it, Balli returned it. He asked each man if either had a weapon on him, and each responded that he did not. Balli asked if he could pat search them for safety, and both men responded that they could. Each defendant stood up and pulled the items out of his pocket, placing them on the table or showing them to Balli. Balli observed that Jose Luis Meza-Lopez took out of his pocket car keys which had a rental tag attached, identifying the make, model and color of the vehicle. The car keys were important to Balli because Fidone had told him about the men leaving the hotel in a green Bonneville with Texas plates and the keys matched that vehicle. Balli testified that, during the conversation in the restaurant, he recognized Jose Luis Meza-Lopez's voice from the conversations intercepted during the wire tap on the Las Jarras bar.

The men put the items back into their pockets and sat down again at the table as did Balli and Gonzalez. Balli asked why they were in the restaurant, and the men advised that they were there to meet with a lady named Maria. Both men stated that they were not staying in the hotel, nor did they have any room available to them in the hotel. Maria was staying in the hotel, but they did not know her last name. Both of the men advised officers that they were in Omaha for a couple of days and had been staying with Ramon Aguirre. Agent Balli testified that the [sic] recognized the name Ramon Aguirre as an individual police had identified as the brother of Jesus Aguirre. Jesus Aguirre had been identified as one of the men involved in the narcotics investigation.

Agent Balli asked if the men would show him where Maria was staying, and the two men agreed. Balli described the men as "gentlemen" during the contact. He said neither of them appeared to have any problems cooperating with police and that the conversation was low key.

Officer Gonzalez testified that the conversation between Balli and the two men occurred in both English and the Spanish language. When Balli asked the men to leave the restaurant and show him Maria's room, neither man objected, and all four of them walked out into the lobby. Gonzalez was the last one who walked out. Gonzalez testified that Pablo Caballero-Chavez spoke fluent English at all times during the contact. Gonzalez testified that, after the contact in the restaurant, he returned to Room 123 which was when he told Mary Stewart about the drugs which had been found in Room

222, Mirandized her and took a statement from her. He did not go to Room 222.

Outside of the restaurant, Agent Balli testified that the two men started taking him to Room 123. Agent Balli suggested that, instead, the two men accompany him to the second floor and go to a different room. Officer Hadcock who had been in the lobby joined Balli and the two defendants as all of them walked up to the second floor.

Balli testified that he and Caballero-Chavez walked first with Hadcock and Jose Luis Meza-Lopez walking behind them. Balli testified the he touched Caballero-Chavez on his elbow but did not keep a hand on him. He did not see Hadcock ever touch Meza-Lopez. Balli said that the time that he touched Caballero-Chavez was when Caballero-Chavez was taking him to Room 123. Balli stopped and said, "How about going this way?", indicating the direction to Room 222. Caballero-Chavez said, "No, that is not where Maria's room was. She's staying in this direction." Balli said, "Yes, I understand, but will you follow me to another room?", and they agreed.

When all four of them got to Room 222, Sgt. Fidone was also there. Balli asked the men if they recognized Room 222, and they said they did not. Balli asked them if they knew anyone who was staying in the room, and they responded that they did not. Balli asked them if they ever been in Room 222, and they responded that they had not. Balli asked if it was okay with the men for the officers to enter Room 222. Balli testified that the men responded they did not care what the officers did, because they were not staying in the room.

They entered the room. Balli asked the men to sit down in chairs, and they did so. Balli again asked whether the two men were sure that they had never been inside of the room, and each men again said that the room did not belong to them and that they had never been inside of it. Balli asked them if the bags that were in the room belonged to them, and both men said that the bags did not belong to them.

Officer Fidone testified that he met Balli, the two men and another officer outside of the locked door to Room 222 at approximately 10:00 o'clock. With Fidone was the hotel manager and a hotel security guard. Balli told Fidone that he had asked the men for permission to search Room 222, but the men denied staying at the hotel and said that Room 222 did not belong to them. They told Balli that they could not give permission because it was not their room. Balli asked if they could search the persons of the men, and the men responded that they could. Balli proceeded to search Meza-Lopez, and Fidone searched Caballero-Chavez. Fidone testified that he did not speak Spanish, however, Caballero-Chavez spoke some English. During the conversation, he told them what his name meant in the English language.

Fidone testified that the manager opened the door to Room 222. Both of the men sat down in chairs inside of the room, and they turned on the television. The men denied that the luggage inside of the room belonged to them and stated again that they could not give permission to search the luggage because it wasn't theirs. The officers went through both of the bags, searching them in front of Caballero-Chavez and Meza-Lopez. Fidone took out the cellular telephone in one of the bags and turned it

on. He punched in the code which had the cellular telephone display its own telephone number and wrote that telephone number down. By then, Gonzalez had already interviewed Mary Stewart. Mary Stewart told him the telephone number she had been given to use to contact the men. The telephone number that the cellular phone displayed was the same telephone number that Mary Stewart had given to Gonzalez as the telephone number she used to contact the Hispanic men.

Agent Balli continued to talk to the men in the room, keeping up the pretense that this was the officers' first time in the room and that up to then they had not found anything.

Balli and Fidone went inside of the bathroom, pulled out the panels and "rediscovered" the nylon bag. They took the bag from underneath the sink and placed it on top of the counter, unzipping the bag. They showed the bag to both of the defendants. Both men continued to deny any connection to the room. The defendants were for the first time separated. Jose Luis Meza-Lopez was taken in the hallway with Agent Balli, while Caballero-Chavez stayed in the room. Both men were formally arrested and advised of their *Miranda* rights in the Spanish language. Fidone estimated that this happened between 10:20 and 10:30 p.m. Fidone testified that Chavez agreed to cooperate and attempted to make an undercover telephone call.

8. Testimony of Pablo Caballero-Chavez

Pablo Caballero-Chavez testified that both Fidone and Balli lied during their testimony. He testified at the

September 24 and December 15 hearings to events very different than those testified to by Shane Rothmeyer, Mary Stewart and the law enforcement officers. After an opportunity to observe and hear his testimony, I do not find him to be credible.

He testified that he had never slept at the Ramada Inn. The first night he was going to be staying there was the night of June 2 when he was arrested.

Chavez testified that neither he nor Meza-Lopez had given Mary Stewart permission to allow their room or their bags to be searched. The bag hidden under the sink with the cocaine in it belonged to both him and Meza-Lopez. It was sent to them.

Caballero-Chavez testified that on June 2, 1999, Meza obtained the keys to the vehicle from Mary Stewart. Both of the men had used the car that day. To his knowledge, the only set of keys to the vehicle were the ones Mary Stewart gave to Meza-Lopez. Neither he nor Meza-Lopez consented to the search of the vehicle, and neither of them told Mary Stewart that she could allow the police to search the vehicle. He knew that Mary Stewart had rented the car in El Paso, Texas using her credit card. The men intended to return the car keys to Mary Stewart that day because she was the one who was to drive it back to El Paso, Texas. He knew that she was the person responsible to the rental agency for the vehicle.

Caballero-Chavez testified that when he and Meza-Lopez were in the restaurant eating, Balli came up with them accompanied by Officer Gonzalez. Balli spoke first in the Spanish language. Caballero-Chavez, speaking in English, testified that he told Balli, "I look Mexican to

you. Is that why you are questioning me?" Balli responded, "I am Mexican also, why would I talk to you for that reason?" Balli then asked the men what they were doing, and Caballero-Chavez told him that they were there looking for a woman named Maria. He denied renting any room in the hotel. Balli told them that the officers had seen them leaving the room, but Caballero-Chavez again denied renting any room. Caballero-Chavez testified that both he and Meza-Lopez were patted down for weapons while they were in the restaurant. When Balli asked him to leave the restaurant, he said, "Let me pay the bill first." Balli agreed, and Caballero-Chavez took out his wallet to pay the bill.

When they went out of the restaurant into the lobby area, Balli took the wallet out of his hand. Balli took out of the wallet a receipt for the screwdriver. Caballero said nothing to him when he did that. Balli also looked at a picture of his family and said, "What a shame." Balli then grabbed him by the arm and took him aside in the lobby saying to him, "You know a lot of things that can help us." Caballero denied knowing anything and told Balli that he had just come along for the ride. At that time, Caballero believed that he was not free to leave and that he was in custody.

Balli asked him to go up to the second floor with them. Meza-Lopez said no, that he wanted to look for Maria and that Maria's room was on the first floor. Meza-Lopez made Caballero-Chavez go with him, and they were going towards Maria's room on the first floor. Balli told both of the men that they should not go that way, but that they should come up with him to the second floor.

Balli grabbed Caballero's forearm, saying, "Let's go," taking him to the second floor on the elevator.

When they arrived on the second floor, the door to Room 222 was standing open. The mattresses were upended, and there were no pillows on the bed. Balli immediately arrested him outside of the open door to Room 222. The only conversation held in the hallway was Balli telling him that it was up to him whether the time he spent in prison was long or short. Caballero-Chavez denied giving Balli permission to search either his person or to take his wallet.

Caballero-Chavez admitted lying to Agent Balli by telling him that he was not staying in Room 222. He repeatedly told the police that it was not his room, and Meza-Lopez said the same thing. Even when they were inside of the room, both of the men denied owning the bags that were found in the room or the bag under the sink.

Bali was called to testify during the December 15 hearing after Caballero-Chavez testified. He denied taking Chavez's wallet from him in the restaurant or in the lobby. He testified that Caballero took out his wallet in order to obtain identification at Balli's request. Balli stated that he looked at the identification and gave it back to Caballero-Chavez. He denied at that time seeing any receipt for the screwdriver.

Balli testified that, after they left the restaurant, he was talking with Caballero-Chavez. Meza-Lopez was approximately ten to fifteen feet away talking with Officer Gonzalez. Meza-Lopez was the one who had started

walking to Room 123 to contact Maria. Agent Balli suggested that they walk in another direction. When he did so, Meza-Lopez stated that Maria's room was down the other hallway. Balli responded that that was fine but that he wanted the men to follow him to go to a different room and to walk in a different direction.

Balli testified that the four men got to the second floor by taking the stairs, not the elevator. He admitted touching Caballero briefly for a second by placing his fingers on his forearm to direct him to go another direction. He denied any other touching until the men were arrested inside of Room 222.

Balli testified that there was no doubt in his mind that the door to Room 222 was closed and locked when he approached it with the defendants. The manager was standing at the door with Sgt. Fidone, and the manager opened the door using the hotel's key.

He testified that neither defendant was arrested until after they had been inside of Room 222 for ten to fifteen minutes. Caballero-Chavez's wallet was seized only after he was formally arrested and that is when the receipt to the screwdriver was found.

Sgt. Fidone also testified at the December hearing on rebuttal. He testified that he was the individual who called the Omaha Police Department lab technician to come to the hotel. He did not call the technician until around 10:00 p.m., after both men had been arrested. The lab technician did not arrive until 10:40 p.m. The technician was not in the room when the defendants first entered it with Agent Balli.

Fidone testified that he only patted Caballero-Chavez down for weapons when he first entered Room 222. Chavez was not handcuffed until after he was arrested. It was at that time that Fidone searched him and seized his wallet. He then found a Walgreen's receipt for a screwdriver. No one had told him about the receipt before he located it inside of the wallet.

LEGAL ANALYSIS

1. The Voluntariness of Mary Stewart's Consent

I find that neither defendant has any reasonable expectation of privacy in Room 123. Nevertheless, I will consider the circumstances surrounding the officers' entry of that room and their consent to search that room as I consider generally the voluntariness of Mary Stewart's consent.

Consent is voluntary if it is " 'the product of an essentially free and unconstrained choice by its maker' . . . rather than 'the product of duress or coercion, express or implied.' " *United States v. Chaidez*, 906 F.2d 377, 380 (8th Cir. 1990) (quoting *Schneckloth v. Bustamonte*, 412 U.S. at 225). " '[K]nowledge of a right to refuse is not a prerequisite of a voluntary consent.' " *United States v. Martel-Martines*, 988 F.2d 855, 859 (1993) (quoting *Schneckloth*, 412 U.S. at 234). "A person's consent may be inferred from his or her words, gestures, and conduct." *United States v. Barahona*, 990 F.2d 412, 418 (9th Cir. 1993).

Applying the above standards, I turn first to Stewart's consent in allowing the officers to enter her hotel room. The testimony is uncontroverted that the officers

identified themselves both orally and by showing their badges. Mary Stewart opened her door and consented to have the officers come into her room and search the room. By her own testimony, she invited the officers in, telling her there were no drugs in her room and they were free to search. Her initial consent occurred within minutes after the contact.

A determination of voluntariness depends on the totality of the circumstances in a "particular case, including 'both the characteristics of the accused and the details of the interrogation.' " *Chaidez* at 380-81 (quoting *Schneckloth*, 412 U.S. at 226).

Mary Stewart is a 70 year old woman and a native speaker of the English language. There was no testimony which indicated that she did not understand what the officers were asking her. Nothing suggests that she was under the influence of either drugs or alcohol during the contact. It is undisputed that the interview was police dominated in that there were three officers in her room during the majority of the conversation. The facts make it apparent that she was not overwhelmed by the officers' presence nor did their conduct overcome her free will. She persisted in providing the officers false information regarding her purpose for being in Omaha and denying that she had rented a second room until the officers specifically challenged her by advising her of the information they had already obtained.

I find that her conduct demonstrates that the consent she gave was voluntary, knowing and intelligent.

a. Consent to Search the Vehicle

I find as a matter of law that Mary Stewart did had the authority to give the officers consent to search the vehicle because the facts and circumstances known to the officers indicated that she had sufficient custody and control of the vehicle.

"Even when police officers have neither probable cause nor a warrant, they may search an area if they obtain a voluntary consent from someone possessing adequate authority over the area." *United States v. Chaidez*, 906 F.2d 377, 380 (8th Cir. 1990) (citing *United States v. Matlock*, 415 U.S. 164, 171 & n. 7 (1974) and *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)). "Moreover, a voluntary consent need not amount to a waiver, consent can be voluntary without being an 'intentional relinquishment or abandonment of a known right or privilege.' " *Chaidez*, 906 F.2d at 380. "Rather, the proper test is whether the totality of the circumstances demonstrates that the consent was voluntary." *Id.*

The written consent to search the vehicle was not obtained until after Mary Stewart had given the officers permission to search Room 222 and the narcotics had been found. She was told that narcotics had been found and that she was under arrest. Officer Gonzalez's testimony is undisputed that he advised her of her *Miranda* rights and that she waived those rights, indicating that she wanted to cooperate and make a statement. It was at that time that Officer Milone obtained Mary Stewart's written consent by using the Permission for Search form. The form by its terms included her hotel room which she had previously given the officers oral permission to

search and the green Pontiac Bonneville. The form specifically advised Mary Stewart as follows: "AND I FURTHER UNDERSTAND that I have a right to deny the officer(s) permission to search my property." (Ex. 3).

Reasonable persons in the position of the officers would have believed that Mary Stewart had sufficient authority over the vehicle to grant permission to search it. The rental agreement for the vehicle was found among her personal papers. The vehicle had been rented in her name, and she had driven the vehicle to Omaha, Nebraska. It was her intention to return to Texas driving the vehicle.

Based on this indicia of ownership and control, I find that the consent given by Mary Stewart to search the automobile was valid and lawful and that evidence seized from the vehicle need not be suppressed.

b. Consent to Search Room 222

Defendants argue that Mary Stewart could not validly give consent to search Room 222 because the officers could not have reasonably believed that she had sufficient authority over their hotel room. I find that the facts reasonably known to the officers at the time that they secured Mary Stewart's consent supported their reasonable belief that she had authority to allow them to search Room 222 and that she had validly exercised her authority in giving them consent.

In *Illinois v. Rodriguez*, 497 U.S. 177 (1990), police gained entry to Rodriguez's apartment with the consent and assistance of Gail Fischer who had lived their [sic]

with Rodriguez for several months. Police talked with Fischer initially at another location. Fischer told police that Rodriguez had assaulted her in a location she referred to as "our" apartment and said that she had clothes and furniture there. The lower court suppressed the officers' consensual entry into the apartment, concluding that Fischer was not a usual resident but rather an infrequent visitor. The court noted that Fischer's name was not on the lease, that she did not contribute to the rent, that she was not allowed to invite others to the apartment, that she did not have access to the apartment when Rodriguez was away, and that she had moved some of her possessions out of the apartment. The state appellate court reversed, finding that there was no Fourth Amendment violation if the police reasonably believed at the time of their entry that Fischer possessed the authority to consent. The Supreme Court affirmed the decision.

> It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government – whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement – is not that they always be correct, but that they always be reasonable.

Id. at 185.

The Court agreed that Fischer had no common authority over the apartment. The Court nevertheless upheld the search finding that the officers' assumption

that Fischer had the authority to consent to the search of the apartment was "reasonable," albeit incorrect.

"Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

As the Supreme Court has repeatedly stressed, the factual determination bearing on the issue of consent to enter a premises must "be judged against an objective standard: Would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' " that the consenting party had authority over the premises. *Rodriguez*, 497 U.S. at 188.

I turn now to the facts at hand. The officers had investigated the registration of Room 222 and learned from the desk clerk that the room was rented by Mary Stewart with her credit card and that Mary Stewart was staying in Room 123. Mary Stewart admitted renting the hotel room, saying it was for two Hispanic men whose names she did not know. Sgt. Fidone, Officer Gonzalez, and Officer Milone all testified that they had been involved in searches of motel rooms in the past. Their experience and training indicated that the individual who rented the motel room could give permission for its search. However, none of them had been involved in a situation where the individual who rented the motel room to be searched was staying in a different motel room.

Defendants argue that Mary Stewart did not have a key to Room 222, had never been physically present in Room 222, nor had she been given permission by either defendant to enter the room or allow anyone else to enter the room. Similarly, as Mary Stewart testified, defendants had never affirmatively prohibited her from granting anyone permission to search the room. I find none of the facts regarding any arrangement between defendants and Mary Stewart determinative in this situation. The officers had no knowledge of those private arrangements, nor was it necessary for them to ferret out all of the details of the private arrangements between the defendants and Mary Stewart before requesting her consent to search Room 222.

It is undisputed that Mary Stewart was hesitant to give the officers permission. By her own testimony, she hoped to "stall" the officers until the men had returned to their hotel room. Nevertheless, when the officers told her that, as the renter of the room, she could consent to its search, she orally gave the officers permission. I find that, on the basis of the facts and circumstances reasonably known to the officers, they were justified in relying on Mary Stewart's consent in entering Room 222. She was the registered renter of the room, and she was legally responsible for any charges incurred by the persons using the room.

The consent of Mary Stewart for the officers' entry into Room 222 did not authorize the officers to look inside of the luggage found in the bedroom area of the room. As Sgt. Fidone candidly testified, while he could give permission for someone to search a hotel room he

had rented, he did not reasonably believe that his permission would entitle the person searching to open luggage belong to another. For this reason, I find that the consent given by Mary Stewart did not authorize the officers to open the suitcases found on the bed and the floor in the bedroom.

A different issue arises, however, with respect to the blue duffle bag of cocaine found hidden under the sink. Before the defendants can challenge the officers' search of that area, they have the burden to establish that they had a legitimate expectation of privacy in the location to be searched. *Rakas v. Illinois*, 439 U.S. 128, 139 (1978). Defendants in this case can establish no legitimate expectation of privacy in the area underneath the bathroom sink of their motel room. The uncontroverted evidence is that area was not accessible to guests and that guests were not permitted by virtue of the room rental to remove the screwed on panels and store personal items under the sink.

Defendants having failed to establish their right to challenge the government's search of the area under the sink and the government's entry into the room being lawful pursuant to Mary Stewart's permission, I find that defendants' challenge to the seizure of cocaine and the other items found within the room must fail.

2. Custodial Status of Defendants

Defendant Caballero-Chavez, after the September evidentiary hearings, filed a motion to suppress the evidence seized from his arrest in the restaurant of the hotel (#45) and a motion requesting the suppression of all

evidence seized from the search of his person (#44). Those motions came on for hearing during the December session. The court agreed to take judicial notice of the evidence at the September hearing.

Defendant argues that the officers did not have reasonable suspicion, probable cause nor an arrest warrant when defendant was approached in the hotel restaurant. He argues that he was illegally arrested when the officers approached him in the restaurant. As a result, defendant argues that the resulting statement and personal papers taken from him should be suppressed.

The issue before me is whether or not the defendants were in custody at any time prior to their formal arrest in the hotel room. As with many of the issues presented to the court, the issue of custody depends upon a careful review of the factual situation.

> Custody occurs either upon formal arrest or under *any other circumstances* where the suspect is deprived of his freedom of action in *any* significant way. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984). In determining whether a suspect is "in custody" at a particular time we examine the extent of the physical or psychological restraints placed on the suspect during interrogation in light of whether a "reasoanble person in the suspect's position would have understood his situation" to be one of custody. *Berkemer*, 468 U.S. at 442; *United States v. Carter*, 884 F.2d 368, 370 (8th Cir. 1989). If [the defendant] believed his freedom of action had been curtailed to a "degree associated with formal arrest," and that belief was reasonable from an objective viewpoint, then [the defendant] was being held in

> custody during the interrogation. *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Berkemer*, 468 U.S. at 440. The determination of custody arises from an examination of the totality of the circumstances.

United States v. Griffin, 922 F.2d 1343, 1347 (8th Cir. 1990).

In considering the relevant factors, the court should look at the accused's freedom to leave the scene, and the purpose, place and length of the interrogation. "While the accused's freedom of action during the interrogation remains a critical factor, the purpose, place and length factors have been interpreted to have inconclusive, independent relevance to the determination of custody." *Id.* at 1348.

The place of the questioning in the facts at hand was a public restaurant and the public hallways of a motel. As described by Agent Balli, the questioning of the defendants was very low key. The defendants produced identification when requested, and it was immediately returned to them after it was examined. When Agent Balli asked to continue the conversation outside of the restaurant, one of the defendants indicated that he needed to settle up with the waiter first, and that occurred. No fact suggests that the defendants were not fully aware of what was occurring since all four individuals were speaking Spanish. Nothing suggests that either defendant was under the influence of drugs or alcohol or impaired in any other manner. Finally, the length of the contact was relatively brief. Agent Balli estimated that it took only a matter of minutes for the conversation in the restaurant and not much longer than that for the walk from the restaurant to Room 222.

At no time was either defendant told that he was not free to leave, nor was either defendant placed in restraints at any time. Agent Balli admitted touching Caballero-Chavez on the arm with his fingers in order to direct him away from Room 123 and in the direction of the second floor room. However, he denies holding his arm or in any way keeping a hand on him. I find Agent Balli's testimony in this respect to be more credible than that of the defendant.

Considering the totality of the circumstances, I find that the evidence does not support defendant's argument that he was in custody from the moment he was approached by the law enforcement officers in the restaurant. I find instead that he voluntarily consented to the questioning and voluntarily accompanied the officers to the second floor room.

In *Thompson v. Keohane*, 516 U.S. 99 (1995), the Court held that "in custody" determinations are mixed questions of law and fact. In analyzing the nature of the "in custody" determination, the Court described it in the follow manner: "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* at 112.

I find that the defendants in the instant case were not in custody. The indicia surrounding the contact all point to a consensual encounter in a public place by officers dressed in plain clothes. I find that reasonable persons in the position of the defendants would have assumed that

they were free to walk away from the encounter. For all of these reasons, I will recommend that the two pending motions specifically alleging that defendant Caballero-Chavez was arrested illegally and searched and questioned unlawfully be denied.

3. Abandonment of Room 222

The government argues and I find that both defendants abandoned any interest they had in Room 222 and its contents by their repeated denials that they had any association with the room or anything found therein.

In *Rakas v. Illinois*, 439 U.S. 128 (1978), the Supreme Court held that the proper Fourth Amendment analysis begins with determining whether defendants have a legitimate expectation of privacy in the searched premises. Defendants have the burden of establishing a legitimate expectation of privacy before it is necessary for the government to demonstrate its authority to search the area in question. *Id.* at 139.

Under certain circumstances, the denial of ownership when questioned can constitute an abandonment. *United States v. Veatch*, 674 F.2d 1217, 1221 (9th Cir. 1981) (listing cases holding that disclaimer of interest in property may constitute an abandonment), *cert. denied*, 456 U.S. 946 (1982). "The very notion of abandonment . . . implies a renunciation of any reasonable expectation of privacy." *United States v. Alden*, 576 F.2d 772, 777 (8th Cir.), *cert. denied*, 439 U.S. 855 (1978). Abandonment is a question of fact "based generally upon a combination of action and intent." *Id.*

In determining whether property has been abandoned for Fourth Amendment purposes, the court must look to the totality of the circumstances, noting in particular two factors: whether the suspect denied ownership of the property and whether he physically relinquished the property. *United States v. Landry*, 154 F.3d 897, 899 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 836 (1999). Further, "whether an abandonment has occurred is determined on the basis of the objective facts available to the investigating officers, not on the basis of the owner's subjective intent." *United States v. Tugwell*, 125 F.3d 600, 602 (8th Cir. 1997), *cert. denied*, 522 U.S. 1061 (1998).

The evidence is uncontroverted that both defendants repeatedly denied any possessory interest in Room 222. When speaking with Gonzalez and Balli in the restaurant, both defendants denied staying in the hotel at all. When the defendants accompanied Balli and Hadcock to Room 222, both defendants denied any interest in the room, telling the officers that they were not renting the room and that they did not care whether or not the officers entered it. The defendants said the same thing after the room had been entered about the search of the two bags found in the room. The defendants were shown the bag located in the secured area underneath the sink in the bathroom, and both denied ownership of that bag. Caballero-Chavez testified that he denied staying in Room 222 to Agent Balli because he was hoping that the misinformation would distract Balli. He told the officers that Room 222 did not belong to him when he was outside of it, and he heard Meza-Lopez say the same thing. Once inside the room, he denied owning any luggage, as did Meza-Lopez. Both he and Meza-Lopez denied owning the

bag under the sink. He denied giving the officers any permission at all to enter Room 222, testifying that he denied having rented the room.

I find that the undisputed evidence of the officers and the defendants indicates that both defendants abandoned any reasonable expectation of privacy that they had to Room 222, to the luggage found inside of the room, and to the duffle bag found underneath the sink. For that reason, defendants cannot challenge the seizure of any evidence from the room, the luggage, or the bag hidden under the sink.

CONCLUSION

I find that the contact between the officers and the defendants in the restaurant, during the walk to Room 222 and in Room 222, was consensual. I find that Mary Stewart knowingly, intelligently and voluntarily gave the officers consent to search the automobile and Room 222. I find further that defendants abandoned any reasonable expectation of privacy that they had in Room 222, in their luggage and in the bag under the sink and for that reason are precluded from challenging the government's search of those areas.

For all of these reasons,

IT IS RECOMMENDED that the Motion to Suppress Evidence (#32), Motion to Suppress Fruits of the Search (#33), Motion to Suppress Search of Pontiac Bonneville (#43), Motion to Suppress Evidence Seized from Defendant's Person (#44) and Motion to Suppress Evidence

Seized from Arrest at Restaurant of Hotel (#45) be denied.

Pursuant to NELR 72.4, any objection to this Report and Recommendation shall be filed with the Clerk of the Court within ten (10) days after being served with a copy of this Report and Recommendation. Failure timely to object may constitute a waiver of any such objection. The brief in support of any objection shall be delivered to Senior Judge Lyle E. Strom at the time of filing such objection. Failure to submit a brief in support of any objection may be deemed an abandonment of the objection.

DATED this 8th day of February, 2000.

BY THE COURT:

/s/ Kathleen A. Jaudzemis
KATHLEEN A. JAUDZEMIS
United States
Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 00-3173

United States of America, *
*
Appellee, * Order Denying Petition
* for Rehearing and for
vs. * Rehearing En Banc
*
Jose Luis Meza-Lopez, *
*
Appellant. *
*

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

September 27, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit